

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARRY EVERETTE NOLEN,

Defendant-Appellant.

UNPUBLISHED

May 19, 2005

No. 249186

Wayne Circuit Court

LC No. 02-000486-01

Before: Talbot, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for larceny from the person, MCL 750.357. Defendant was sentenced, as a third habitual offender, MCL 769.11, to five to twenty years in prison, and ordered to pay restitution of \$613. We affirm, but remand for resentencing.

On appeal, defendant first argues that the trial court committed error requiring reversal when it reopened the proofs and required defendant to speak in court as part of an in-court identification procedure designed to permit the complainant to identify the person who had stolen her purse by the sound of his voice. Defendant contends that the prosecution did not request that the proofs be reopened to conduct an in-court identification, and that the trial court's action to do so constituted bias and partiality. Defendant also asserts that the identification procedure used by the trial court was impermissibly suggestive. We find no error requiring reversal.

Because no exception need be taken to a finding or decision of the trial court, MCR 2.517(A)(7), the trial court's decision to reopen the proofs is preserved for appeal and is reviewed for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 419; 633 NW2d 376 (2001). However, defendant did not object to the admission of the voice identification evidence when it was offered, and therefore, this issue has not been preserved for appeal. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Our review of the identification evidence is for a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

In evaluating whether the trial court abused its discretion in reopening proofs, it is relevant to consider whether any undue advantage would be taken by the party for whom the proofs were reopened and whether the opposing party can show surprise or prejudice. *Herndon*, *supra* at 420. Assuming defendant was surprised by the reopening of proofs, we find no

prejudice to defendant. The prosecution stated its belief that the proofs were sufficient without the voice identification, but that if the trial court did not, it could require defendant to speak in court so that the victim may identify his voice. Even if the prosecution's comment is insufficient to constitute a request to reopen the proofs, "a trial court may question witnesses to clarify testimony or elicit additional relevant information" so long as the questioning is "not intimidating, argumentative, prejudicial, unfair or partial." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). Here, the trial court did not act in a biased manner in reopening the proofs for the voice identification where, at the scene of the crime, the victim had identified the voice of the person stealing her purse as belonging to the defendant. The victim had also identified defendant by the name of Barry Nolen. This additional evidence was relevant and served to clarify the identification being made by the victim. Thus, we find no bias on the part of the trial court, and the trial court did not abuse its discretion in reopening the proofs.

We further conclude that the in-court voice identification did not constitute plain error affecting defendant's substantial rights. "An identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004), citing *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). An unduly suggestive identification procedure may result in suppression of the in-court identification unless there is an independent basis for its admission. *Id.* at 114 n 8, citing *People v Anderson*, 389 Mich 155, 169; 205 NW2d 461 (1973), rev'd on other grounds 470 Mich 602 (2004); see also *People v McMillen*, 126 Mich App 211, 219; 336 NW2d 895 (1983).

In the present case, the victim had known the defendant for ten years before this incident, and defendant, who lived across the hall from the victim, had previously helped the victim with certain tasks. The victim testified that she heard defendant exit his apartment immediately before her purse was grabbed, that she recognized his voice when he spoke to her while her purse was being grabbed, and that she heard him reenter his apartment after her purse had been taken. Additionally, some time after the crime, defendant told the victim that it was his word against her word as to whether he had committed the crime. Thus, although she was visibly impaired, the evidence established circumstances through which the victim would have been able to identify defendant by his voice. We conclude, therefore, that because the victim had an independent basis for identifying the defendant before the in-court identification occurred the identification procedure was not impermissibly suggestive, as to give "rise to a substantial likelihood of misidentification." *Harris, supra*. Thus, defendant has failed to show plain error and suppression of the in-court identification is not warranted.

Defendant next claims that he is entitled to be resentenced because the trial court failed to state sufficient reasons to support its deviation from the guidelines range, the reasons stated did not support the extent of the upward deviation, and the trial court failed to recognize it had discretion over the imposition of the maximum sentence under the habitual offender statute. Because the trial court's reasons for deviation from the guidelines are not clearly articulated, we remand for resentencing.

Pursuant to MCL 769.34(10), "a sentence that is outside the appropriate guidelines sentence range, for whatever reason, is appealable regardless of whether the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand." *People v Kimble*, 470 Mich

305, 310; 684 NW2d 669 (2004). However, since this issue was not preserved, we will review it for plain error affecting defendant's substantial rights. *Carines, supra*, 460 Mich 763.

Defendant's conviction of larceny from the person carries a statutory maximum penalty of ten years. MCL 750.357. Defendant's sentencing information report reflects that he was scored ten points for offense variable (OV) 10. (OV) 10 provides that ten points may be scored when "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship or the offender abused his or her authority status." MCL 777.41(1)(b). With the scoring of ten points for OV 10, defendant's guidelines minimum range was zero to nine months. The trial court departed from guidelines range and sentenced defendant to a minimum sentence of 30 to 120 months' imprisonment. The trial court gave the following reasons for its departure: (1) defendant had a position of trust with victim which he violated; (2) defendant took advantage of victim's total blindness; and (3) defendant mocked victim's blindness, telling her she could never prove he stole her belongings. Defendant's sentence was enhanced, as defendant was a third habitual offender, to 60 to 240 months' imprisonment.

A court may depart from the appropriate sentence range established under the sentencing guidelines if it has a substantial and compelling reason for that departure and states on the record the reasons for departure. *Babcock, supra*, 469 Mich at 255, citing MCL 769.34(3). However, the *Babcock* Court also articulated the following:

Although the trial court may depart from the guidelines range on the basis that a substantial and compelling reason to do so exists, the trial court "shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight." Therefore, if the seriousness of the defendant's conduct and his criminal history have already been taken into account in determining the guidelines range, they cannot be used to justify the trial court's departure, unless the trial court finds that these factors have been given inadequate or disproportionate weight. [*Babcock, supra*, 469 Mich at 258 n 12, citing MCL 769.34(3)(b).]

Here, the trial court's stated substantial and compelling reasons for its departure were already taken into account in determining defendant's appropriate sentence range. The trial court's first reason, that defendant violated his position of trust with Arnold, was taken into account under OV 10 as abusing his authority status. The trial court's final two reasons, which dealt with the fact that defendant exploited Arnold's blindness, were also taken into account under OV 10, as exploiting a victim's physical disability and/or agedness. Nevertheless, it is unclear from the trial court's statement whether the fact that defendant qualified for scoring under OV10 by virtue of multiple factors led the trial court to conclude that these factors had been given inadequate or disproportionate weight in the guidelines, thus justifying a sentence departure. Thus, we remand the case to the trial court for resentencing so that it may more clearly articulate its reasoning.. *Babcock, supra*, at 260-261; see also n16.

Defendant next argues that the trial court's reasons for departure did not support the extent of the upward departure. In light of our remand for resentencing, we need not decide this issue.

Defendant further argues that the trial court erred in failing to exercise discretion regarding the maximum sentence imposed upon defendant pursuant to the habitual offender statute. According to MCL 769.11(a), if a person has been convicted of two or more felonies and commits a subsequent felony, the trial court may sentence that person to imprisonment for a maximum term that is not more than twice as long as the term prescribed by law for a first conviction. While MCL 769.11(a) clearly gives the trial court discretion over the maximum sentence to be imposed, there is no legal requirement that a trial court state on the record that it is exercising its discretion. *People v Beneson*, 192 Mich App 469, 471; 481 NW2d 799 (1992). Absent clear evidence that the sentencing court incorrectly believed that it lacked discretion, the presumption that the trial court knows the law must prevail. *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001).

At sentencing, the trial court stated the following:

Accordingly on the crime of larceny from a person, the defendant is committed to the state's prison for a minimum period of 30 months to a maximum period of 120 months. I set aside and now sentence the defendant as a habitual offender, third offense and accordingly the statutory maximum becomes 240 months and the defendant will serve a minimum sentence of 60 months as a habitual third.

Once again, the trial court's language is ambiguous and does not articulate whether the trial court recognized that it had discretion over the maximum sentence imposed. However, since this case is being remanded for resentencing on another issue, we recommend that the trial court also clarify whether it recognized that it had discretion over the maximum sentence it imposed upon defendant.

Defendant's convictions are affirmed, but the case is remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder